88-1197

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

DRAKE TOWING COMPANY, INC. and
BRENT TOWING COMPANY, INC., ET AL,
Petitioners,

v.

LLOYD ATWOOD, ET AL,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a federal court of appeals abuse its discretion and/or act contrary to decisions of this Honorable Court and the mandate of the Fifth Amendment of the United States Constitution when it imposes sanctions on parties and counsel without benefit of due process?

2. When the sanctions imposed by a court of appeals (without benefit of due process) include nonmonetary sanctions, what are the parameters of due process that should have governed such a situation?

3. Should this Honorable Court resolve the conflict that now exists between several Circuits relative to the varying standards and quality of due process available to parties and/or counsel targeted for sanctions?

4. When principles of federalism are not at issue, does this Honorable Court's holding in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), apply with equal force to denials of due process arising under the Fifth Amendment rather than the Fourteenth Amendment; alternatively, should this Honorable Court review its decision in *Paul v. Davis* in order to modify and/or clarify it so as to make it unequivocally comport with substantive constitutional provisions?

5. Does a court of appeals abuse its discretion and/or act contrary to decisions of this Honorable Court and the mandates of the Fifth, Ninth, and/or Tenth Amendments when it deprives parties and counsel of liberty, property, and/or privacy interests without due process of law?

6. Should this Honorable Court exercise its supervisory authority or otherwise grant equitable relief in order to correct the gross miscarriage of justice that occurred in the lower court?

LIST OF PARTIES

Pursuant to Supreme Court Rules 21.1(b) and 28.1, counsel for the Petitioners certifies that the following listed persons or corporations either have an interest in the outcome of this case or were parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Drake Towing Company, Inc., Petitioner/Defendant/Appellee

2. Brent Towing Company, Inc., Petitioner/Defendant/Appellee

3. Lawrence E. Abbott and Gary P. Landry of Abbott, Best & Meeks, Petitioners and counsel for Drake Towing Company, Inc., and Brent Towing Company, Inc.

4. Respondents/Plaintiffs/Appellants:

Lloyd Atwood	Robert Pate
Paul Hamm	Paul Pate
Kevin Singleton	Russell Carver
Jeffrey Welch	Roy Carver

5. Russell S. Gill/John Wise
Attorneys for Plaintiffs/Appellants

6. Union Carbide Corporation, Co-Defendant/Appellee

7. Robert M. Contois, Jr./James O. Dukes
Jones, Walker, Waechter, Poitevent, Carrere & Denegre/Bryant, Stennis & Colingo
Attorneys for Union Carbide Corporation

8. Employers of Wausau, A Mutual Company, and its affiliate, American Marine Underwriters, Inc.

9. Allstate Insurance Company

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Drake Towing Co., Inc.
and Brent Towing Co., Inc.
Petitioners/Defendants/Appellees

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The petitioners, Drake Towing Company, Inc., Brent Towing Company, Inc., and their undersigned counsel, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 5, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at *Atwood v. Union Carbide Corp., et al.*, 850 F.2d 1093 (5th Cir. 1988), hereinafter referred to as "*Atwood II.*" Earlier, on June 21, 1988, the Fifth Circuit had promulgated its initial opinion in the matter below in *Atwood v. Union Carbide Corp., et al.*, 847 F.2d 278 (5th Cir. 1988), hereinafter referred to as "*Atwood I.*"

The memorandum decision of the United States District Court for the Southern District of Mississippi (Roper, J.) has not been reported and is not relevant to the situation at bar.

JURISDICTION

Invoking federal admiralty jurisdiction under 28 U.S.C. §1333, the eight respondents brought their separate suits in the Southern District of Mississippi, seeking recovery under the Jones Act and the General Maritime Law. Although the cases were consolidated for discovery purposes, they were never consolidated for substantive purposes (a critically important point, as discussed *infra*). On July 15, 1987, the Southern District granted petitioners' motions for summary judgment in each of the eight cases on the independent and alternative grounds of (1) causation, and (2) prescription.

Although respondents (henceforth, "plaintiffs") filed a timely appeal, they never briefed the independently

dispositive issue of causation, despite the Fifth Circuit's much extended entreaty that they do so. After the briefing deadline imposed on the plaintiffs by the Court went unanswered, petitioners (henceforth "defendants") filed a motion to dismiss the appeal as frivolous. On June 21, 1988, the Fifth Circuit rendered a judgment and issued its *Atwood I* opinion dismissing the appeal as frivolous and imposing sanctions on the plaintiffs and their counsel.

The Fifth Circuit directed counsel for all defendants to submit an affidavit and bill of costs for the sums claimed as due. Upon receipt of those documents, plaintiffs timely petitioned for rehearing, submitting with their petition *in camera* documents that defendants to this day have never been allowed to see. The Fifth Circuit then issued its *Atwood II* opinion, granting the plaintiffs' petition in large part, drastically reducing the sanctions imposed in *Atwood I*, and imposing sanctions instead on defendants and their counsel (which included defamatory statements that had no basis whatsoever in fact). The *Atwood II* opinion was issued without a hearing, without allowing defendants to file a brief in opposition to plaintiffs' petition, without otherwise allowing defendants and counsel an opportunity to be heard in any manner, and without regard for due process. Defendants were then compelled to file their own petition for rehearing, which was denied by the court below, as is reflected in its minute entry issued on September 23, 1988.

On December 13, 1988, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including January 20, 1989.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

(a) *Fifth Amendment, United States Constitution:*

No person shall ". . . be deprived of life, liberty, *or* property without due process of law. . . ."

(b) *Federal Rule of Appellate Procedure 40(a):*

The pertinent part of F.R.A.P. 40(a) provides that "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

(c) *Federal Rule of Appellate Procedure 40(b):*

The pertinent part of F.R.A.P. 40(b) provides that "Except by permission of the court, or as specified by local rule of the court of appeals, a petition for rehearing shall not exceed 15 pages."

STATEMENT OF THE CASE

The merits of the district court's judgment, and the Fifth Circuit's subsequent affirmance thereof, are not at issue in this writ. Defendants seek a writ, instead, relative to the Fifth Circuit's decision, *sua sponte,* to initially impose substantial sanctions upon the plaintiffs for pursuing a frivolous appeal, then drastically reduce those sanctions in response to plaintiffs' petition for rehearing (to which defendants were never allowed to respond), and then go one step further by imposing sanctions on defendants and their counsel without allowing any opportunity whatsoever to be heard.

In 1984 and 1985, the eight plaintiffs below instituted separate lawsuits (later consolidated *only* for discovery purposes), sounding in the Jones Act and the General Maritime Law, pursuant to 28 U.S.C. §§ 1331 and

1333. In what might be aptly described as one of the most expensive and egregious examples of "litigious fallout" from the now infamous Bhopal, India incident, the plaintiffs' complaints alleged that they were exposed to toxic chemicals while serving aboard the M/V WARREN (a Drake Towing Company vessel) as it pushed Union Carbide chemical barges on the Ohio and Mississippi rivers. As is reflected in Appendix D attached hereto, the plaintiffs served aboard the WARREN for varying intervals of time spread out over the approximate five year span of 1978-1982. Altogether, the general counsel for the eight plaintiffs had 42 separate lawsuits that he forum selected among five different courts across the country (four federal district courts and one state court). None of those courts consolidated the cases before them for substantive purposes. As of 11/28/88, defendants have obtained 42 out of 42 consecutive summary judgments (*none* of which were reversed on appeal) based upon causation and/or prescription. The combined attorneys' fees and costs incurred to date by defendants and co-defendant Union Carbide are $ 1 MILLION *plus*. The only attorneys' fees awarded to the present defendants (by the Fifth Circuit in *Atwood II)* are $500.00 (or $62.50 per each of the 8 separate cases in the *Atwood* group, as compared to the $9,850.00 sought for work reasonably done on that appeal).

The Fifth Circuit's two *Atwood* opinions reflect an erroneous perspective that the 8 plaintiffs' claims arose from a singular and contemporaneously experienced tort. As is reflected in Appendix D, the cases below were *not* analogous to 8 passengers riding on a bus who were all injured in the same accident, at the same time, and by the same instrumentality of harm. To the contrary, the eight Atwood plaintiffs did *not* work aboard the WARREN on either the same calendar dates or for the same number of days; nor were they allegedly exposed to the same chemical substances or experienced the same number of days of

exposure to each, or the same symptoms (or duration of each) as a result of such exposures. In a substantive context, these were 8 separate cases that were merely consolidated only for discovery purposes in order to economize on legal fees, costs, and judicial resources.

The Fifth Circuit's official records for the 8 cases below, which do not include voluminous discovery documents accumulated in 8 separate cases over nearly 4 years, number somewhere between 4,000 and 5,000 pages packed into 18 volumes. The file contents of defendants' counsel consist of about 10,000 pages. The facts of each of the eight cases had to be addressed individually in order to uphold the district court's dual grant of summary judgment. Consequently, on appeal an exhausting amount of time was required to sort out, extract, and refamiliarize oneself with the massively voluminous, relevant factual data pertaining to each individual plaintiff in order to prepare an adequate appellate brief. Moreover, at the district court level, separate motions for summary judgment were filed for the causation and prescription issues. Relative to the latter, counsel for the present defendants had prepared very exhaustive briefs in each of the 8 cases. In order to economize on his clients' legal fees, counsel simply adopted by reference the causation based motion for summary judgment filed by co-defendant Union Carbide. Thus, on appeal, counsel was addressing the massive factual date relating to the causation issue for the first time.

Two other additional factors must be viewed in the proper context relative to the time and effort put forth by defendants in preparing their appellees' brief. While the cases were still in litigation, 3 out of the 8 Atwood plaintiffs had *died*, two from cancer! Each of the plaintiff's complaints sought **$ 3 million** in compensatory damages and **$ 6 million** in punitive damages. Thus, defendants were

seeking on appeal to uphold dismissals of a total of $ 24 million in compensatory damages and $ 48 million in punitive damages. Moreover, and without intending any slight towards Union Carbide, a reversal of the trial court would have left defendants facing a jury, with 3 of 8 plaintiffs dead, and aligned on the same side as every would be litigant's "Darth Vader" since Bhopal.

In the face of all of the foregoing circumstances, defendants' counsel expended a mere 50 or so hours of time preparing an appellate brief for the Fifth Circuit. Although the 8 cases were indeed consolidated on appeal, that was done only so that the parties would not have to bear the onerous consequences of preparing and printing eight separate briefs. In substance as opposed to form, and relative to the massive task of factual data assimilation, organization, and analysis (*especially* the time and *hours* required for such a task), these were 8 *separate* cases. Moreover, each separate case involved two completely independent issues that had to be briefed (causation and prescription). Thus, for all practical purposes, counsel had to prepare the substantive equivalent of 16 separate briefs packaged into one.

Confronted by such a massive task, defendants produced a brief that was 50 pages long with 108 pages of exhibits and 415 pages of record excerpts (quite reasonable numbers when divided by a factor of 8 to take into account the number of cases involved, two issues to each case). When the *Atwood II* decision was published, defendants and their counsel were absolutely astounded to find the Fifth Circuit assailing them with completely unfounded allegations of "inefficiency" and "multiple billings" (the latter a euphemism for fraud). Moreover, the Fifth Circuit had deprived defendants and their counsel of both a property interest *and* a liberty interest (reputation plus economic interests) without any opportunity whatsoever to be heard.

A simple hearing of a mere one hour's duration or less, just a sliver of due process, would have forestalled the necessity of the present petition.

In publishing *Atwood II,* the Fifth Circuit apparently overlooked the fact that Union Carbide had asserted a substantial cross-claim against the present defendants for contractual indemnification of attorney's fees and costs incurred in defending against the plaintiffs' claims. Immediately after that opinion came out, Carbide's counsel pointedly advised defendants' counsel that he would use the Fifth Circuit's offending language to prosecute the cross-claims and defend against any counter assertions by the present defendants that Carbide's fees were unreasonable and excessive. Quite recently, Union Carbide filed in the Eastern District of Louisiana a complaint for declaratory judgment (Civil Action No. 88-5064) alleging that the present defendants owe it $680,000.00 for attorneys' fees incurred in the 42 cases (including the Atwood eight). Thus, the Fifth Circuit's sanctioning statements in *Atwood II* have not only seriously implicated liberty interests but also *very* substantial property interests.

The Fifth Circuit clearly stated in *Atwood II* that the reduction of sanctions from those imposed in *Atwood I* was due to two separate factors: (1) "special circumstances" (never clearly set forth), *and* (2) defendants' alleged excessive and multiple billings. Thus, the causation nexus *is* there relative to due process implications. Most importantly, however, the court's reduction of sanctions on plaintiffs and their counsel, and counter imposition of sanctions on defendants and their counsel, was the result of an empirically invalid and factually groundless "lowest common denominator" analysis. In a gross miscarriage of justice, the Fifth Circuit simply looked at numbers (14.9 hours v. 89.5 hours) in an out of context analysis that disregarded all underlying circumstances. There were very specific and

justifiable reasons for the qualitative and quantitative differences between the time spent on the appeal by Union Carbide (14.9 hours) and the present defendants (89.5 hours).

In *Atwood I,* the Fifth Circuit was quick to praise the 12/29/87 letter directed by undersigned counsel to plaintiffs' counsel (Mr. Russel Gill) in an effort to bring about an early and inexpensive end to the appeal. Mr. Gill quickly responded by letter and offered to drop the appeal if we agreed to waive all claims to sanctions, etc. - which we did. It appearing that the appeal was going to settle, on January 13, 1988 we then prepared a motion to extend our then pending briefing deadline of January 20 so that we could reduce our briefing "pace" but still protect our clients' interests should plaintiffs not go thru with the settlement. Copies of the detailed billing statements we provided to the Fifth Circuit with the affidavit it requested in *Atwood I* clearly reflected that we did *not* bill for *any* time on the briefing process during the critically important time frame of 1/13/88 (when the settlement was agreed upon by our clients) and, please note this date, January 25, 1988.

As of 1/13/88, both ourselves and Union Carbide's counsel were quite justified in believing that the appeal was over and we had succeeded in saving our clients substantial attorneys' fees as a result of the settlement precipitated by our above noted letter of 12/29/87. As hindsight and the 1/27/88 letter of plaintiffs' counsel prove, we were quite prophetic r.e. that plaintiffs might not follow thru with the settlement. In that letter, Mr. Gill confirmed his phone call of two days earlier (January 25) wherein he noted that his clients refused to drop the appeal: "Therefore, it will be necessary for you ***and*** Gary Landry to file Briefs in this matter." The Court can perhaps now imagine the shock experienced by us and Carbide's counsel. Up until 1/25/88 (the date of the phone call), we reasonably

believed that the appeal was over, and thus, in order to economize our clients' fees/costs, we brought our brief preparation efforts to a halt. Suddenly, Mr. Gill does a 180 degree about face.

The briefing deadlines are critically important to note at this point. Carbide's counsel had previously (on 12/15/87) moved for and obtained an extension for filing his client's brief until, *please note,* 1/28/88. Solely due to Mr. Gill's abrupt turnaround, Carbide's counsel (of Biloxi, Miss.) suddenly found himself with only *3* days to draft his brief, get it to the printers, and deliver it to the Fifth Circuit in New Orleans by 5:00 P.M. on 1/28/88.

Carbide's counsel advised us that he immediately phoned the Clerk's office and requested but was *denied* an additional extension for filing his brief. His only feasible option was to patch together a rush job and later supplement it after Mr. Gill submitted his own long-overdue and awaited (but *never* filed) brief on the issue of causation. Thus, Mr. Dukes (Carbide's counsel) simply extracted his trial court brief, made whatever changes he could under the pressing time constraints, and slapped on an appellate court cover sheet. When Mr. Gill (plaintiffs' counsel) allowed the 3/14/88 briefing deadline imposed on him by the Fifth Circuit via its letter of 2/23/88 to pass without compliance, Mr. Dukes knew that it would not be necessary to draft a supplemental brief (which would have significantly increased the number of billable hours he devoted to the appeal). By allowing that deadline to pass, plaintiffs' counsel had committed obvious appellate suicide.

Now contrast Mr. Dukes' panic ridden dilemma with the situation of undersigned counsel at that point in time. Because of our prescience of mind on 1/13/88 when we filed our motion to extend our briefing deadline (which was granted until, note, 2/5/88), when Mr. Gill's 1/25/88 phone call came around, we had 10 days to draft our brief com-

pared to only 2 or 3 for Mr. Dukes! And since we did not have an opportunity to see Mr. Dukes' brief for Union Carbide until ours was nearly completed, we had *no* way of then knowing how comprehensive it would be. Thus, we were completely justified under those hectic circumstances in doing a very comprehensive and quality intensive brief that included one issue (the most difficult one, causation) we were addressing in-depth for the first time. And when plaintiffs' counsel allowed his 3/14/88 briefing deadline to pass, Mr. Dukes wisely elected to ride our coattails just as we had rode his at the trial level relative to the causation issue.

It was only because of the foregoing developments that, during the limited time frame the Fifth Circuit initially authorized full recompense for fees incurred, Union Carbide's counsel claimed only 14.9 billable hours versus our 89.5 billable hours. Moreover, of those 89.5 hours, only approximately 50 hours or so were for the preparation of the present defendants' appellate brief, as was clearly reflected in the billing invoices submitted by counsel to the court. Those invoices prove beyond dispute that *all* of the time for which we billed our clients relative to the preparation of the actual brief took place during that previously discussed critical time frame of 1/25/88 (the day of Mr. Gill's phone call) through 2/5/88 (the day our brief was due and filed).

Next, defendants emphasize that the Fifth Circuit failed to take into consideration (when it compared 14.9 hours v. 89.5 hours) differences between the work product and pleadings prepared and filed by counsel for the respective defendants. In *Atwood I,* the Fifth Circuit did *not* limit the award of attorney's fees only to the time spent preparing the actual appellate brief. As this Court undoubtedly appreciates, the handling of an appeal *also* includes motion practice at the appellate level, correspondence and consultations with one's clients, correspondence directed to

other counsel and the court, telephone conferences with those persons, review of correspondence and pleadings generated by the other parties, and the time expended in sifting through the thousands of pages of file documents.

During the time frame set forth by the Fifth Circuit in *Atwood I* for allowing attorney's fees (i.e., 1/11/88 - 6/20/88), undersigned counsel prepared 3 separate pleadings, *above and beyond* the present defendants' appellate brief: (1) a 4 ½ page motion for extension of time to file brief; (2) a 12 page motion for damages, with 22 pages of exhibits; and, (3) the all important motion to dismiss, 10 pages long and 26 pages of exhibits. By comparision, Mr. Dukes (Carbide's counsel), as reflected on his billing statements submitted to the court, prepared and filed *ONLY* one motion (for damages), which itself was only 16 *lines* long, or slightly over one page. Thus, we prepared 3 separate motions totaling nearly 27 pages and including 48 pages of exhibits (which had to be extracted from thousands of pages of file contents) in contrast to Mr. Dukes' *single* sixteen line motion. Additionally, we composed at least 11 separate letters during that same time period. The total time involved in performing an exhaustive research on 3 separate federal statutes and related case law (F.R.A.P. 38, 28 U.S.C. §§ 1912 and 1927), drafting 3 separate motions of 27 pages in length (plus 48 pages of exhibits), reviewing correspondence *and* pleadings drafted by other counsel, and composing the above referenced letters, required approximately 39 of our 89.5 hours (again, the equivalent work product of Carbide's counsel was that single 16 line motion). The remaining 50 hours were used to prepare a *fifty* page appellate brief that included 108 pages of exhibits and 415 pages of record excerpts (versus Union Carbide's 28 page brief and 200 pages of excerpts). The Fifth Circuit gave no consideration whatsoever to the foregoing circumstances when it unfairly accused defendants and counsel of inefficiency and

multiple billings.

Finally, the Fifth Circuit quite literally put the proverbial cart before the horse. In *Atwood II,* that court stated "It is difficult to understand how defending so frivolous an appeal could require anywhere near 89.5 hours' effort." In making that statement, the court overlooked the bizarre "Looking Glass" posture where everything was turned inside out during the appeal below. In the normal situation, the plaintiffs/appellants file their brief *first* and the defendants/appellees then respond. As of 2/5/88, when undersigned counsel filed the present defendants' brief, plaintiffs' counsel had *yet* to file any brief whatsoever (submitting instead only a short letter adopting by reference a brief filed in a related group of cases that dealt *only* with the issue of prescription). As is reflected in the Fifth Circuit's own docket sheet, that court wrote a letter to plaintiff's counsel on 2/23/88 and ordered such counsel to brief the issue of causation by 3/14/88. Thus, nearly 3 weeks *after* undersigned counsel had already expended the time to prepare and file defendants' brief, the Fifth Circuit itself did not yet consider the appeal to be frivolous, and instead continued to extend the proverbial olive branch to plaintiffs' counsel. The appeal below did not become "frivolous" until plaintiffs' counsel had allowed his 3/14/88 briefing deadline to pass unanswered. By that time, undersigned counsel had already expended all of the time to which the Fifth Circuit objected in *Atwood II.* Once that deadline had passed, undersigned counsel filed the motion to dismiss that ultimately led to the dismissal of plaintiffs' cases (*note*: Union Carbide *never* filed such a motion). By definition, the appeal never became frivolous until nearly 1 ½ **months AFTER** undersigned counsel had filed his clients' brief (on 2/5/88). In effect, the Fifth Circuit has penalized defendants and undersigned counsel for preparing and filing the very same motion to dismiss that saved that court from having to address the merits of the issues involved in

the appeal and, moreover, that led to an early termination of the appeal!

In response to the edict of *Atwood I,* defendants provided the Fifth Circuit with their detailed billing statements for 8 separate files. If permitted to do so, defendants could quite literally submit a line by line analysis of each of those billing statements and prove beyond refute that there was neither inefficiency nor multiple billings that took place with regard to the 89.5 hours objected to by the Fifth Circuit. Defendants emphasize that they filed a motion to extend the page limit of their petition for rehearing from the statutory limit of 15 pages to 28 pages. The Fifth Circuit refused to grant said motion, thereby further denying defendants and counsel due process under the circumstances of the case.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit's imposition of counter sanctions upon defendants and their counsel in *Atwood II,* without due process of law, conflicts with decisions of this Court and other Circuits.

A. THE FIFTH CIRCUIT *DID* SANCTION DEFENDANTS AND THEIR COUNSEL IN *ATWOOD II.*

If read in a vacuum, and pursuant to the most superficial of analyses, the language of *Atwood II* would not appear to result in the application of sanctions against defendants and their counsel. When juxtaposed with the pertinent jurisprudence (including that of the Fifth Circuit itself), however, the only tenable conclusion is just the opposite.

In drafting a dissent that was a virtual prophecy of a critical rule of law subsequently promulgated by the Fifth Circuit in *Thomas v. Capital Sec. Services, Inc.,* 836 F.2d 866 (5th Cir. 1988), Judge Pratt of the Second Circuit

opined that Congress "intended to make available in the **universe of sanctions** an attorney's fee as but one example of a wide array of possible monetary and **nonmonetary** sanctions. Some examples of nonmonetary sanctions might include . . . something as simple as a **judicial reprimand** . . . in a **published opinion.**" *Eastway Const. Corp. v. City of* **New York,** 821 F.2d 121, 125 (2nd Cir. 1987). Soon thereafter, and sitting *en banc,* the Fifth Circuit held that pursuant to F.R.A.P. Rule 11 the term "sanction" can embrace a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures. *Thomas, supra,* 836 F.2d at 878. "Therefore, as a less severe alternative to monetary sanctions, districts courts may choose to **admonish** or **reprimand** attorneys who violate **Rule 11.**" *Id.*

Interestingly enough, the Fifth Circuit then quoted the very same scholarly article referenced by Judge Pratt in *Eastway, supra:*

> In suggesting these as viable alternatives to monetary sanctions, we agree with Judge Schwarzer's comments cautioning trial judges not to forget the impact of criticism.
>
> > Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive, can also **damage a lawyer's reputation and career** (*note:* property and liberty interests). The judge should take care, therefore, that what is said is commensurate with the violation. There is a distinction between bad practice and lack of integrity. Being guilty of the former does not invariably justify a charge of the latter.

Thomas, 836 F.2d at 868; *citing,* Schwarzer, *Sanctions Under The New Federal Rule 11 — A Closer Look,* 104

F.R.D. 181, 201-02 (1985). Defendants respectfully submit that when the Fifth Circuit published *Atwood II* it failed to heed the same standards that it noted in *Thomas* were applicable to trial judges. Instead, and without benefit of any due process, it wrongfully accused defendants and counsel of both a bad practice ("inefficiency") and a lack of integrity ("multiple billings"). Of even greater importance, the Fifth Circuit made the following observation in footnote 17 of its *Thomas* opinion [1] that quite succinctly framed one of the core issues of the present petition: "We recognize that due process considerations arise with other forms of sanctions; however, we do not address those considerations today." 836 F.2d at 878.

In the alternative or supplement, it is respectfully submitted that *Atwood II* did indeed result in monetary sanctions upon defendants and their counsel. In *Atwood I*, the Fifth Circuit held that *double* costs should be imposed on the individual plaintiffs and attorneys' fees should be assessed on their counsel. When *Atwood II* was issued, the Fifth Circuit reduced the double costs to single and reduced the actual attorneys' fees to sub-nominal ($500, or $62.50 per each of the eight cases). Most importantly, the language of *Atwood II* clearly set out the causal nexus for that drastic reduction: "Because of the special circumstances . . . and in light of apparently excessive billings. . . ." [As to the "special circumstances," defendants respectfully submit that the plaintiffs' blatant refusal to dismiss their frivolous appeal could not conceivably be a special circumstance; moreover, plaintiffs' counsel was allowed to submit *in camera* documents in support of the

[1] Although the *Thomas* decision focused on Fed. R. Civ. P. Rule 11, the Fifth Circuit soon thereafter issued *Smith Intern., Inc. v. Texas Commerce Bank*, 844 F.2d 1193, 1197 (5th Cir. 1980), and pointedly noted that most of its comments in *Thomas* "are equally applicable to section 1927" (i.e., 28 U.S.C. 1927). Moreover, the Fifth Circuit reiterated that nonmonetary and noncompensatory "sanctions" are authorized. *Id.*

petition for rehearing that were never made available to defendants, in violation of due process. Defendants further submit that the only so-called special circumstances that may have been present would have been those set out in those *in camera* documents.]

Since the above discussed jurisprudence, including that of the Fifth Circuit, makes clear that the term "sanctions" can include nonmonetary measures, defendants respectfully submit that a subsequent reduction of monetary sanctions already granted, when predicated in part if not in whole on the alleged improper conduct ("inefficiency" and/or "multiple billings") of defendants, must constitute the functional and substantive equivalent of a monetary sanction.

Thus, the present petition involves at least two important constitutional issues, both apparently *res nova:* (a) the parameters of due process in the context of nonmonetary sanctions, and (b) whether sanctions once imposed but subsequently reduced due to the alleged improper conduct of the previously favored party constitute the imposition of sanctions and require due process considerations.

B. UNDER THE PREVAILING JURISPRUDENCE, INCLUDING DECISIONS OF THIS COURT AND OTHER CIRCUITS, DUE PROCESS IS A PREREQUISITE TO THE IMPOSITION OF SANCTIONS ON PARTIES AND/OR COUNSEL; MOREOVER, THERE IS A CONFLICT AMONG THE CIRCUITS AS TO THE EXTENT OF DUE PROCESS THAT SHOULD APPLY.

By imposing sanctions on the parties and counsel without benefit of due process, the Fifth Circuit adopted a position in *Atwood II* that stands in stark contrast to the rule of law commanded by this Court and other Circuits. For example, the Ninth Circuit quite recently reversed a

district court's imposition of sanctions due to that court's failure to heed one of this Court's landmark decisions:

> The Supreme Court has cautioned that "sanctions . . . should not be assessed lightly or without a fair notice and an opportunity for hearing on the record." *Roadway Express Inc. v. Piper,* 447 U.S. 752, 767, 100 S.Ct. 2455, 2464, 65 L.Ed. 2d 488 (1980). Notice before the imposition of sanctions may be actual or constructive. *See Eash v. Riggins Trucking, Inc.,* 757 F.2d 557, 571 (3d Cir. 1985). Due process further requires that parties subject to sanctions have "sufficient opportunity to demonstrate that their conduct was not undertaken recklessly or willfully." *Toombs v. Leone,* 777 F.2d 465, 472 (9th Cir. 1985). *See also Miranda v. Southern Pacific Transportation Co.,* 710 F.2d 516, 522-23 (9th Cir. 1983) (due process requires opportunity to prepare defense and explain questionable conduct at hearing).

F.T.C. v. Alaska Land Leasing, Inc., 799 F.2d 507, 510 (9th Cir. 1986). The *Alaska Land* court reversed the sanctions imposed on an attorney in that case because the record was insufficient to show that he had "received adequate notice that the district court was considering imposition of sanctions against him." *Id.* [Defendants and counsel emphasize that the Fifth Circuit did not provide them with *any* notice that it was considering sanctions.]

As a specific example of the existing conflicts between the circuits, and the concomitant need for guidance from this Court, the Ninth Circuit more recently held as follows in *Tom Growney Equip. v. Shelley Irr. Development,* 834 F.2d 833, 836 fn. 5 (9th Cir. 1987):

> Early notice can deter continuing violations, thereby saving monetary and judicial resources. (citation omitted) Furthermore, we distinguish ourselves from other courts that have found the "notice" requirement satisfied by the mere presence of the rule.

See, e.g., Donaldson v. Clark, 819 F.2d 1551, 1560 (11th Cir. 1987).

The appellant in *Tom Growney* was a law firm that had been sanctioned pursuant to Fed.R.Civ.P. 11. After first commenting that there was no hint in the record that appellant had any notice sanctions were being considered, the Ninth Circuit concluded that in the absence of extraordinary circumstances, procedural due process requires notice and an opportunity to be heard "*before* any governmental deprivation of a property interest." 834 F.2d at 835. (court's *own* emphasis) Observing further that no opportunity was offered to explain the allegedly improper conduct, the Ninth Circuit emphasized that an "individual's right to fairness and accuracy must be respected." *Id.* at 835-36. (Although the sanctions imposed in the *Tom Growney* case were pursuant to Rule 11, the language of that opinion clearly does not restrict the due process considerations only to that statute.)

To momentarily take a step backwards, defendants note that the opinion cited by the Ninth Circuit in Footnote 5 of its *Tom Growney* decision, i.e., *Donaldson v. Clark,* 819 F.2d 1551, 1557 fn. 7 (11th Cir. 1987), recognized that the term "sanctions" can include ". . . issuing a published or unpublished reprimand" (as the Fifth Circuit did in the matter below in *Atwood II*). And although the Eleventh Circuit does not afford sanctioned parties the same full panoply of procedural rights as those available in the Ninth Circuit (all the more reason for this Court to provide guidance), the Eleventh Circuit did conclude in *Donaldson, supra,* that "an attorney or party should be given early notice that his or her conduct" may warrant sanctions. 819 F.2d at 1560.

In *Muthig v. Brant Point Nantucket, Inc.,* 838 F.2d 600, 607 (1st Cir. 1988), the First Circuit cited the Eleventh Circuit's above discussed decision in *Donaldson, supra,* and concluded that notice and opportunity to present arguments *before* imposition of Rule 11 sanctions comports

with the due process protections contained in the Constitution. The sanctioned party's opponent in *Muthig* had in fact filed a motion requesting Rule 11 sanctions, thereby giving the appellants adequate notice. "The briefing process allowed them and their counsel opportunity to present evidence and argument. . . . Counsel did not, and does not, point to any controverted factual matter that may have called for additional procedure." 838 F.2d at 607. As was noted earlier herein in the Statement of the Case, the Fifth Circuit did *not* allow a briefing process that gave defendants and counsel an opportunity to present evidence and argument. Moreover, there *were* controverted facts that should have called for additional procedure.

The Sixth Circuit recently addressed a situation quite similar to the one now at bar. *In Re Ruben*, 825 F.2d 977 (6th Cir. 1987). "While the district judge does not clearly delineate the legal grounds for sanctioning Ruben (a law professor), his opinion mentions Federal Rule of Civil Procedure 11, 28 U.S.C. §1927, and a judge's inherent power to punish bad faith conduct during litigation." *Id.* at 981. *Citing* this Court's decision in *Roadway Express, supra*, the Sixth Circuit held that the imposition of sanctions on one party must be reversed if only because she never had an adequate opportunity for a hearing "on the record." *Id.* at 985. Relative to due process considerations, the Sixth Circuit ultimately held that the district judge's failure to clearly delineate the basis for sanctions against one of the attorneys in the case required remand to reconsider alleged misconduct with more exacting scrutiny and to identify discrete acts of the offending conduct. "Careful analysis and discrete findings are required, no matter how exasperating the case." *Id.* at 991. Defendants and undersigned counsel respectfully submit that since the Fifth Circuit was sitting as a court of first impression below, relative to the imposition of sanctions, due process requires that it too provide such a careful analysis and discrete findings.

Sitting *en banc*, the Third Circuit also recently addressed a situation where the district court did not specify the authority upon which it relied in sanctioning an attorney. *Eash v. Riggins Trucking Inc.* 757 F.2d 557 (3rd Cir. 1985). Unlike the Sixth Circuit's chosen path in *In Re Ruben*, the Third Circuit did not remand for purposes of identifying that authority, noting instead that "there appeared to be two possible sources: 28 U.S.C. §1927 (1982) or the court's inherent power." 757 F.2d at 560. The court did, however, remand the case because procedural due process required notice and an opportunity to be heard before sanctions could be imposed (it was not apparent from a review of the record that any form of actual or constructive notice was given to the attorney whose conduct was deemed sanctionable). Of great importance, the *Eash* court unabashedly stated that "we believe that as a general practice a monetary detriment should not be imposed by a court without prior notice and some occasion to respond." *Id.* at 570. [Relative to the matter at hand, defendants and counsel respectfully submit that the Fifth Circuit's reduction of sanctions and offending language clearly resulted in a "monetary detriment," particularly in light of Union Carbide's recently filed $680,000.00 complaint for declaratory judgment.] Also of particular interest relative to whether this court should grant cert, the opening sentence of the *Eash* opinion pointedly noted that the imposition of sanctions on an attorney "presents an issue important to judicial administration." *Id.* at 599.

Echoing the sentiments voiced by the Third Circuit in *Eash*, both the Seventh and Tenth Circuits have also recently considered the issue of due process and sanctions to be of such paramount juridical importance as to warrant an *en banc* hearing: *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192 (7th Cir. 1987), and *Braley v. Campbell*, 832 F.2d 1504 (10th Cir. 1987). "In any event the Supreme Court has made clear — what is anyway obvious — that the

requirements of due process of law are applicable to a proceeding to impose santions . . . ." *Hill*, 814 F.2d at 1201. [Note that the operative words are that the requirements of due process are applicable "to a proceeding" (which *should* include a petition for rehearing) rather than merely to one party or the other involved in such proceeding.] The Tenth Circuit was equally unequivocal in *Braley:*

> It is a venerable principle in our law that, "The power of court should **never be exercised** without notice to the offending party of the grounds of complaint against him, and affording him **ample opportunity of explanation and defense.** This is a **rule of natural justice** . . . .

832 F.2d at 1514, citing *Bradley v. Fisher,* 80 U.S. 335 (1871).

Standing alone like a voice in the wilderness, and in stark contrast to the positions taken *en banc* by three other circuits, the Fifth Circuit decided in the *Atwood* case below that it could impose sanctions while altogether dispensing with due process. The great weight of jurisprudential authority, including the decisions of this Court, irrefutably establish that the Fifth Circuit's actions were constitutionally impermissible.

Thus, with respect to the reigning standards for due process in the context of sanctions, there currently exists among the Circuits a land of confusion in which justice is a variable commodity that operates as a function of geography. Depending upon the whims of providence or the proverbial roll of the dice (i. e., to parody a currently popular film, one's "Accidental Birthplace"), a citizen may be swept into a vortex akin to Joseph Heller's *Catch-22* or the classic Orwellian dilemma of *Animal Farm ("all pigs are equal, but some pigs are more equal than others").* For example, the foregoing discussion of the jurisprudence reveals that when citizens of the First, Third, Sixth,

Seventh, Ninth, and Tenth Circuits are faced with possible sanctions, they will reap a bountiful harvest of due process that enables them to drink from a golden chalice of milk and honey. In the Eleventh Circuit (*Donaldson, supra*), however, the landscape becomes more barren as the panoply of procedural rights lessen and the citizen is rationed a diet of plain but somewhat stale white bread. Finally, and ironically, in the same city where one's palate is whetted by visions of seafood gumbo, oysters on the half shell, jambalaya, crawfish bisque, and shrimp etouffee, the Fifth Circuit allows only a bitter taste from the fruit of the lemon tree, and litigants/counsel become citizens of a lesser god, endowed with due process rights that are certainly more alienable than those of their fellow citizenry in the other circuits. In light of these unacceptable conflicts, it is imperative that this Honorable Court take the necessary corrective action to establish a uniform standard and rule of law.

II.

Independently of the foregoing considerations, and notwithstanding the Court's holding in *Paul v. Davis*, the Fifth Circuit has deprived defendants and counsel of liberty, privacy, and/or property interests without due process of law; alternatively, *Paul v. Davis* should be modified or clarified so as to unequivocally comport with the substantive provisions of the United States Constitution.

"The power of the state to destroy reputation, and consequently inflict economic and personal injury, is immense." Haines, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*. 30 Stanford L. Rev. 191, 232 (1977). In *Wisconsin v. Constantineau*, 400 U.S. 433, 91 S.Ct. 507 (1971), this Court held without reservation that when a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. "Yet

certainly where the State attaches a badge of infamy to the citizen, due process comes into play." Id. at 436.

Notwithstanding its previous holding in *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), that a grand jury exceeds its constitutional role by naming unindicted co-conspirators because such action stigmatizes without due process, the Fifth Circuit "posted" (via its published opinion in *Atwood II)* the present defendants and counsel as persons who engage in "multiple billings" (a euphemism for fraud).[2] In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155 (1976), the Court pointedly noted that imputing criminal behavior to an individual is generally considered defamatory per se and actionable without proof of special damages. The Fifth Circuit's defamatory remarks in *Atwood II* were patently false and constituted a deprivation of the Fifth Amendment rights of the present defendants and counsel.

Commentators have either roundly criticized *Paul v. Davis* or otherwise given a very restrictive interpretation to its holding that reputation alone, apart from some more tangible interests, is neither a liberty, privacy, nor property interest sufficient to invoke the procedural protections of due process. For example, one scholar has opined that "*Paul v. Davis* must be understood as a case about federalism-based limits on the remedial powers of a federal court acting under 42 U.S.C. §1983 rather than as a repudiation of deep substantive principles." R. Stauffer, *Tenant Blacklisting: Tenant Screening Services and The Right to Privacy*, 24 Harvard Journal on Legis. 239 (1979).

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[2] The Court has previously considered the following labels as stigmatizing: "dishonest," "immoral," and "alcoholic." *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin, supra*, 400 U.S. at 436-37. Similarly, the Ninth Circuit held in *Stretten v. Wadsworth Veterans Hosp.*, 537 F.2d 361, 366 (9th Cir. 1976), that a stigma of moral turpitude infringes upon a liberty interest.

"Perhaps because it was preoccupied with state autonomy, the *Paul* Court failed to analyze the impact of its narrow due process construction on actions brought against federal officials . . . . The Court's holding in *Paul* opens the constitutional door to state and federal use of official blacklists as an extralegal sanction." Haines, *supra* at p. 207. *See also,* Monaghan, *Of "Liberty" and "Property"*, 62 Cornell L. Rev. 405 (1977). Since *Paul v. Davis* was decided solely in the context of the Fourteenth Amendment and the Court's desire to limit constitutional torts arising under 42 U.S.C.§1983, the situation at bar presents a pristine opportunity for the Court to clear the air and decide whether the same rule of law applies when federalism is not at issue and the deprivation of constitutional rights occurred primarily with respect to the Fifth Amendment.

For reasons quite similar to those emphasized by the above cited commentators, defendants and counsel respectfully submit that the rule of *Paul v. Davis* is not controlling with respect to the present matter. Throughout its opinion, the Court repeatedly emphasized that the petitioner therein had at his disposal state court remedies that could have at least provided for subsequent if not prior due process. To the contrary, the present defendants and counsel are boxed into a classic "Catch-22" predicament that denies them any forum whatsover for clearing their names and reputations. The principle of judicial immunity serves as an absolute bar to petitioners instituting civil litigation in order to have their day in court. And although defamation is a criminal offense in Louisiana, that state's criminal code §14:50 excuses judges from the law (and therefore should be struck down as unconstitutional) by excepting them from prosecution via absolute immunity, thereby denying petitioners the only other potential forum in which they could have vindicated themselves (albeit it would be only with great reluctance and as a last resort that such a course would be followed). The end result, if *Paul v.*

Davis is literally applied to Fifth Amendment situations, is that federal officials such as judges are given "constitutional carte blanche to defame private citizens" and thus "no individual can feel secure that he will not be arbitrarily singled out for similar ex parte punishment by those primarily charged with fair enforcement of the law." Haines, *supra* at 192; *Paul v. Davis,* 424 U.S. at 716 (Brennan, J., dissenting).

The situation at bar is further distinguishable in that the Court used the term "mere defamation" in *Paul v. Davis* as something apart from defamations accompanied by other official action. 424 U.S. 706, 709; Haines, *supra* at 191. Unlike the situation in *Paul v. Davis,* the court below pointedly linked its defamatory words with its decision to drastically reduce the sanctions imposed in *Atwood I* from double costs to single costs and actual attorney's fees to subnominal fees. Thus, the Fifth Circuit did accompany its stigmatizing and defamatory language with official action that included a substantial infringement upon property as well as liberty interests. Therefore, even if the "reputation plus" test applies to Fifth Amendment situations such as the one now at bar, defendants and counsel respectfully submit that the additional prong was in fact satisfied.

Indeed, the Fifth Circuit has itself given a restrictive interpretation to *Paul.* Although it acknowledged the "reputation plus" requirement, the Fifth Circuit pointedly held in *Wells v. Hico Indep. School Dist.,* 736 F.2d 243, 256 (5th Cir. 1984) that "loss of a property interest . . . . is not required" to establish a liberty interest. Moreover, the court emphatically stated that a liberty interest *is* infringed when a governmental body imposes a "stigma or other disability that forecloses freedom to take advantage of other employment opportunities" (which is exactly what the *Atwood II* opinion has done to counsel). *Id.,* citing *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972). Even

more incredible, in light of its actions below, the Fifth Circuit further noted in footnote 18 that the "remedy for a deprivation of liberty is a name-clearing hearing before the governing body." *Id.*

Other courts have echoed the sentiments of the Fifth Circuit relative to *Paul.* In *Bohn v. County of Dakota,* 772 F.2d 1433, 1437 fn. 4 (8th Cir. 1985), the Eighth Circuit similarly distinguished *Paul* and held that the stigma imposed upon the complainants infringed their liberty interests because it "exposed them to public opprobrium" and "impaired the family's ability to function in the community" (i.e., the "plus" prong). The district court in *Angrisani v. City of New York,* 639 F.Supp. 1326, 1333 (E.D.N.Y. 1986), unequivocally held that a "person's good name, reputation, honor and integrity all implicate a liberty interest. . . . the interest an individual has in being free to move about, live, and **practice his profession without the burden of an unjustified label of infamy.**" Clearly, the Fifth Circuit's language in *Atwood II* deprived counsel and defendants of cherished liberty and privacy interests.

The situation at bar is further removed from the constraints of *Paul* because of the property interests, above and beyond liberty interests, that have been infringed by *Atwood II.* First, defendants *did* have a property "interest" (and probably also a "right") in the costs and attorney's fees that were initially granted to them and then taken away without a hearing. Second, as was noted in the Statement of the Case, counsel for Union Carbide has filed a $680,000 indemnification claim against defendants and has pointedly stated that he will use the defamatory language of *Atwood II* to buttress that claim. Obviously, that state of affairs alone demonstrates a very substantial property interest has been prejudiced by the lower court's false statements. Finally, the Fifth Circuit's own language in other opinions establishes beyond refute that a

substantial property interest of counsel has similarly been unconstitutionally infringed. In *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980), the court admitted that the "outcome of any proceeding handled by a law firm may affect the partners' financial interests as well as certain noneconomic (but property) interests, including the reputation and goodwill of the firm. . . . its relationship with its clients, and its ability to attract new clients."

Thus, not only is the "reputation plus" test of *Paul* satisfied by the situation at bar, but separate and substantial property interests have also been infringed without due process as a result of the *Atwood II* opinion. Defendants and counsel have been unjustly and unconstitutionally "posted" to an even greater extent than the petitioner in *Wisconsin v. Constantineau.* It is inconceivable that the right to purchase alcohol (which society has an obvious interest in discouraging) could be exalted above the right of an attorney to practice law or a pushboat company to conduct business without being subjected to a continuing, published, brand or stigma wrapped around their necks like the proverbial albatross.

Alternatively, it is respectfully submitted that the Court should set aside *Paul* and articulate a new rule of law that does not dilute the substantive rights of life, liberty, property, and privacy guaranteed to the citizenry by the Constitution. The Haines comment, discussed *supra*, provides some excellent suggestions that the Court may wish to take into consideration and which are simply too involved to reiterate herein. The situation at bar provides a particulary ripe opportunity for the Court to modify or clarify *Paul* and thereby provide unequivocal guidance to the lower courts and the bar relative to the paramount constitutional issues presented by this writ.

III.

Due to the gross miscarriage of justice that occurred in the court below, this Honorable Court should exercise its supervisory authority and order the Fifth Circuit to strike the offending language of *Atwood II* and grant defendants and counsel a full hearing that comports with the due process requirements of the Constitution.

Would any member of this Court purchase an automobile from a salesman who (a) claimed that the engine of the base model Hyundai Excel he has to sell packs more horsepower than a top of the line Ferrari, but (b) admitted he has neither ever looked under the hood of either vehicle type nor read any sales or technical data supporting his representation? Although the Fifth Circuit in *Atwood II* professed an inability to comprehend how one defendant could have expended 89.5 hours on the appeal versus 14.9 by the other defendant, it tacitly admitted in *Atwood I* (App. A at p. A-6) that it had neither read nor even looked at the briefs filed by the respective defendants: "When fishing for a sunken boot, we need not cast a sharpened hook." Upon analyzing *Atwood I,* the Court will note that the Fifth Circuit did not address the merits of the substantive issues of the appeal but instead rendered an opinion *only* on the motion to dismiss for failure to brief a dispositive issue. Even more incredibly, it was *only* the present defendants that filed such a motion (Union Carbide never did so), and in *Atwood I* the Fifth Circuit cited the very same cases and codal articles that were discussed at length in the present defendants' very thorough motion to dismiss (which obviously took hours to prepare). How can the mandate of due process be satisfied when the Fifth Circuit did not even look at the respective work product of the parties prior to publishing a stigma against one side that will endure in perpetuity?

As was clearly set forth in the Statement of the Case, there were numerous and entirely justifiable facts and circumstances (not the least of which was plaintiffs reneging at the last minute upon the previously agreed settlement) that accounted for the disparity in the number of the billable hours expended on the appeal by the respective defendants. Moreover, there is an additional element that further demonstrates a denial of due process and a gross miscarriage of justice. Federal Rule of Appellate Procedure 40(b) imposes a 15 page limit on petitions for rehearing unless leave of court is granted for additional pages. Because of the unique circumstances of this case that were set forth in the Statement of the Case, defendants originally filed a 28 page petition for rehearing along with a motion to exceed the limits of Rule 40(b). The Fifth Circuit denied the motion and did not even allow the longer petition to remain in the record for this Court to review. The result was a classic "Catch-22" denial of due process. The Fifth Circuit commited so many errors in *Atwood II* that they could not possibly be rebutted in 15 pages, and then that very same court refused to allow the damaged parties an adequate opportunity to point out those errors. It was a prototypical example of the fox that just raided the henhouse sitting as the presiding judge over his own trial. Defendants and counsel respectfully submit that the Fifth Circuit's inflexible adherence to the 15 page limit, under the facts and circumstances of this case, constituted an additional denial of due process and gross miscarriage of justice.

Finally, the Court's attention is directed to the edict of F.R.A.P. 40(a) that an answer to a petition for rehearing will not be received by a court *but* such a petition will "ordinarily not be granted in the absence of such a request." When plaintiffs filed their petition for rehearing, defend-

ants had to sit back and wait to be asked for a response, which request never came. Moreover, plaintiffs' petition was in fact granted in part despite the absence of such a request by the court for a response by defendants. The Fifth Circuit did not point to any "extraordinary" circumstances that justified the lack of such a request. Moreover, the grant of plaintiffs' petition in the absence of a response from defendants was contrary to its own holding in *United States v. Allegheny-Ludlum Indus., Inc.*, 568 F.2d 1073, 1074 (5th Cir. 1978). Defendants and counsel respectfully submit that under the peculiar circumstances of the case below, the Fifth Circuit's failure to request and allow defendants to respond to plaintiffs' petition for rehearing constituted both a denial of due process and a gross miscarriage of justice.

The Court may recall the previously cited commentator's observation that "Judges are prone to forget the sting of public criticism delivered from the bench." Schwarzer, *supra* at 201-02. Since it is a fundamental tenet of liberty and a free society that judges are no more above the law than any other citizens, defendants and counsel respectfully submit that this Honorable Court must and should exercise its supervisory authority and order the lower court to provide them with their constitutionally mandated day in court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted this Petition for Certiorari should be granted.

LAWRENCE E. ABBOTT
GARY P. LANDRY
Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-4640

FILED
SEP 23, 1988

LLOYD ATWOOD, ET AL.,
Plaintiffs-Appellants,

versus

UNION CARBIDE CORPORATION,
DRAKE TOWING COMPANY, INC.,
and BRENT TOWING COMPANY, INC.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING
(SEPTEMBER 23, 1988)

Before GEE, RUBIN and SMITH, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby **denied.**

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

APPENDIX B

Lloyd ATWOOD, et al.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CORPORATION, et al.,
Defendants-Appellees.

No. 87-4640

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

June 21, 1988.
Rehearing Denied Aug. 5, 1988.*

Appellees moved to dismiss appeal from the United States District Court for the Southern District of Mississippi, John M. Roper, United States Magistrate, and requested imposition of double costs and attorney's fees. The Court of Appeals held that: (1) appeal was frivolous, and (2) appellants were jointly and severally liable for appellees' taxable costs incurred during entire pendency of appeal, and appellants' attorney was subject to appellees' reasonable attorneys' fees.

So ordered.

Russell S. Gill, Biloxi, Miss., for plaintiffs-appellants.

Robert M. Contois, Jr., New Orleans, La., James O. Dukes, Gulfport, Miss., for Union Carbide.

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* The opinion on rehearing is published at 850 F.2d 1093.

Lawrence E. Abbott, Michael G. Cordes, Gary P. Landry, New Orleans, La., for Drake & Brent.

Appeal from the United States District Court for the Southern District of Mississippi.

Before GEE, RUBIN, and SMITH, Circuit Judges:

PER CURIAM:

Appellees Drake Towing Company ("Drake") and Brent Towing Company ("Brent") move to dismiss this appeal pursuant to Fed.R.App.P. 28(a)(4) and 31(c), contending that appellants have failed to brief an alternative ground on which the court below granted summary judgment. Moreover, in two separate motions filed respectively by Drake and Brent jointly, and by appellee Union Carbide, all appellees move to dismiss this appeal as frivolous and request the imposition of double costs and attorneys' fees pursuant to Fed.R.App.P. 38, 28 U.S.C. § 1912, and/or 28 U.S.C. § 1927. We grant appellees' motions and dismiss this appeal as frivolous pursuant to Loc. R. 42.2, and award limited attorneys' fees and double costs.

I.

The eight appellants in this case are former Drake employees who served as deckhands aboard the M/V WARREN, a tugboat owned and operated by Drake. Between 1977 and 1981, the WARREN pushed unmanned chemical barges owned by Union Carbide. Brent had contracted to provide the towage for Union Carbide and had subcontracted part of the job to Drake.

The present *Atwood* litigation is but one of five consolidated suits involving a total of 41 former Drake

employees who served aboard the WARREN. Most of these actions were filed between February and September of 1984, and most seek recovery under the Jones Act and general maritime law for personal injuries from toxic fumes.

In July 1987, the court below granted summary judgment on the alternative independant grounds of causation and prescription. In January 1987, another of the five consolidated groups of companion cases—hereinafter referred to as the *Bush* litigation[1]—had been dismissed by the United States District Court for the Eastern District of Louisiana, following a summary judgment for defendants on the sole ground of prescription.

Appeals from both the *Atwood* and *Bush* cases were then duly filed with this court. As might be expected, appellants in the *Bush* litigation briefed prescription, but not causation, as an issue for appellate reveiw. The *Atwood* appellants, on the other hand, have filed no brief at all. Instead, in a self-styled "Motion to Consolidate Appeals and To Adopt the Brief in Case No. 87-3269," appellants sought to adopt the *Bush* brief by reference, on the basis of a supposed identity of issues and facts in the *Bush* and Atwood cases. In December 1987, we granted appellants' motion to adopt the *Bush* brief, although the motion to consolidate the *Atwood* and Bush appeals was carried with the case and has not been ruled upon.

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[1] *Bush v. Union Carbide Corp.*, No. 84-936 (E.D.La. Dec. 30, 1986) [available on WESTLAW, 1986 WL 15243], *aff'd* 851 F.2d 358 (5th Cir. 1988).

[2] Appellees move for dismissal pursuant, *inter alia*, to Fed.R.App.P. 31(c), contending that appellants have failed to file any brief whatsoever. However, this rule is inapposite to the present case, since appellants are elsewhere permitted by the rules to adopt by reference the brief of another party. *See* Fed.R.App.P. 28(i).

By letter, the clerk of this court subsequently notified the *Atwood* appellants' counsel that the *Bush* brief was insufficient to address the issues raised by this appeal. Counsel was further informed that such issues in compliance with the rules of appellate procedure. Finally, this court set a briefing deadline for March 14, 1988, which counsel has allowed to pass. Presently, he reaffirms his position that "[t]he issue of prescription and causation was addressed in the Bush brief sufficiently to avoid the voluminous briefing required to rehash the same thing all over again in the Atwood cases."

II.

[1] Appellees Drake and Brent contend that this appeal should be dismissed because appellants have failed to argue the issue of causation, as appellants believe is required by Fed.R.App.P. 28(a)(4). In pertinent part, this subsection of Rule 28 provides as follows:

> The brief of the appellant shall contain ... [a]n argument.... The argument shall contain the contentions of the appellant *with respect to the issues presented,* and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. [Emphasis added.]

A close reading of this subsection in connection with subsection (a)(2) will indicate, however, that this rule does not itself mandate that the appellant's brief contain argument relating to all of the issues presented *by the case.* Subsection (a)(2) provides that "[t]he brief of the appellant shall contain ... [a] statement of issues *presented for review.*" (Emphasis added.) Thus, when subsection (a)(4) speaks of an argument relating to issues presented, it merely refers to those issues set out by the appellant in the

"statement of issues" section of the appellant's brief. We liberally construe briefs in determining issues presented for review; however, issues not raised at all are waived. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504-06 (5th Cir. 1981). *Accord, Bledsoe v. Garcia*, 742 F.2d 1237, 1244 (10th Cir. 1984).

It would be onerous to require the appellant, subject to dismissal of an appeal, to frame and argue all issues conceivably presented by a given case. A losing party may elect not to pursue certain issues on appeal; when such an issue is meritless, the appellant should be praised for foregoing the opportunity. Furthemore, any determination as to whether a case does in fact raise a certain legal issue not addressed in an appellant's brief would require us to consider the merits underlying that point, and we thus anticipate that future appellees would abuse the dismissal procedure as a vehicle for sounding out the court on the merits of the issue.

[2-4] Therefore, we find that appellants in the instant case have technically complied with Rule 28 insofar as the brief they have adopted from the *Bush* litigation both presents issues for review (albeit issues relating to prescription) and argues various contentions relating to those issues. This does not mean, however, that appellants' brief is free of procedural defects warranting dismissal of this appeal. Such dismissal may be proper where, as here, a review of the record shows that the legal points presented lack arguable merit and are therefore frivolous. *Hailes v. Equitable Life Assurance Society of the United States*, 729 F.2d 1037, 1037-38 (5th Cir. 1984). Although a determination of frivolousness requires, too, some amount of inquiry by us into the merits of an appeal, our level of analysis in this posture aims only to ferret out the obviously deficient case. When fishing for a sunken boot, we need not cast a sharpened hook.

As we have already noted, issues not briefed, or set forth in the list of issues presented, are waived. *Kincade v. General Tire & Rubber Co.; Bledsoe v. Garcia; United States v. Anderson,* 584 F.2d 849 (6th Cir. 1978); *Brown v. Sielaff,* 474 F.2d 826, 828 (3d Cir. 1973); *United States v. White,* 454 F.2d 435, 439 (7th Cir. 1971), *cert. denied,* 406 U.S. 962, 92 S.Ct. 2070, 32 L.Ed.2d 350 (1972). When a party has failed to comply, the court of appeals is not required to search the record for error. *Chicago & Western Indiana R.R. v. Motorship Buko Maru,* 505 F.2d 579, 581 (7th Cir. 1974).

[5] Since appellants have adopted the *Bush* brief, we examine it to determine the issues presented here. That examination reveals no mention of the causation issue. Because that issue constituted an independant ground for dismissal below, appellants were required to raise it to have any chance of prevailing in this appeal.

Appellants' duty to have addressed this point becomes all the more pressing in light of then unpublished, in *Humphries v. Drake Towing Co.,* 836 F.2d 1344 (5th Cir. 1987), an appeal from another group of companion cases in which we affirmed summary judgment on causation grounds in circumstances substantially identical to those *sub judice.*[3] Appellants' attorney was warned in a December 29, 1987, letter from the attorney for Drake and Brent that our opinion in *Humphries* rendered the instant appeal "moot and frivolous" and that attorneys' fees and double costs could be awarded if the appeal were not abandoned. By the same letter, appellants' counsel was also

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[3] Appellees attached *Humphries,* as an exhibit to their motion papers and thereby put counsel for appellants on notice of it as governing precedent in this appeal. Fifth Circuit Loc.R. 47.5.3 provides that "[u]npublished opinions are precedent."

apprised of our recent decision in *Clay v. Union Carbide Corp.*, 828 F.2d 1103 (5th Cir. 1987), affirming summary judgment on prescription grounds in another factually indistinguishable case.

A month later, appellants' attorney advised that his clients did not choose to withdraw this appeal. Appellants' only formal response to the motion for damages is that the companion cases already decided by this court, *Humphries* and *Clay*, "although relevant to the issues raised in the present Appeal, are not determinative, particularly since issues of substantive law of the State of Mississippi are involved in the Appeals filed by your APPELLANTS." In that one-page response, appellants do not even attempt to designate the issues which they contend make *Clay* and *Humphries* not controlling on the instant appeal. Thus, we are unable to determine that there are any such issues. And of course, if issues different from those in *Clay* and *Humphries* indeed should have been presented here, appellants' counsel should have filed his own brief on those issues.

In sum, despite the clear, unambiguous, dispositive holdings of this court, counsel for appellants persisted in pursuing this appeal. For that reason, and because counsel allowed this court's briefing deadline to expire without supplimenting the *Bush* brief on the causation issue, hence waiving that issue, we find this appeal frivoulous.

III.

Under Fed.R.App.P. 38, "[i]f a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." And under 28 U.S.C. § U.S.C. § 1927, an attorney "who so multiplies the proceedings ... unreasonably and vexatiously" may be held liable for, *inter alia*, attorneys' fees.

Meritless claims impose "an unnecessary burden on this court and [infringe upon] the rights of appellees." *Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984)("legal contentions lack any arguable merit").[4]

There is ample authority in this circuit for awarding costs and attorneys' fees against a party under Fed.R.App.P. 38 and 28 U.S.C. § 1912, and against an attorney under 28 U.S.C. § 1927. Where justified, we have imposed *double* costs and attorneys' fees.[5]

[6] We conclude that in this case, appellants and their attorney share responsiblity for the frivolous appeal. The attorney has failed to raise a dispositive issue, and his client has failed to respond to appellees' offer, in effect, to waive sanctions if the appeal had been dropped. Accordingly, we direct that double appellees' taxable costs incurred during the entire pendency of this appeal be assessed against the appellants, jointly and severally, pursuant to Fed.R.App.P. 38. We conclude that pursuant to 28 U.S.C. § 1927, appellants' attorney should be assessed appellees' reasonable attorneys' fees incurred after the date when appellees' counsel informed appellants' counsel that *Humphries* and *Clay* had been decided and that attorneys' fees

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[4] *See Coughlan v. Starkey*, 845 F.2d 566, 570-71 (5th Cir. 1988); *Olympia Co. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291 (5th Cir. 1983) (claim was "frivolous, unreasonable and without foundation, justifying award of attorneys' fees in the district court under 28 U.S.C. § 1927); *Stelly v. Commissioner*, 761 F.2d 113, 116 (5th Cir.), *cert. denied*, 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985). *See Farguson v. M Bank Houston, N.A.*, 808 F.2d 358, 360 (5th Cir. 1986).

[5] *See Alter Financial Corp., v. Citizens & Southern Int'l Bk.*, 817 F.2d 349, 350 (5th Cir. 1987); George v. Texas, 788 F.2d 1099, 1100 (5th Cir. 1986); *Hale v. Harney*, 786 F.2d 688, 692 (5th Cir. 1986); *Olympia Co. v. Celotex Corp.*, 771 F.2d at 893; *Stelly v. Comm'r, 761 F.2d 1270, 1272 (5th CIr. 1985); Knoblauch v. Comm'r*, 752 F.2d 125, 129 (5th Cir.), *cert. denied*, 474 U.S. 830, 106 S.Ct. 95, 88 L.Ed.2d 78 (1985).

and double costs could be awarded if the then-frivolous appeal was not dropped. If the appeal was not frivolous when filed, it was indeed frivolous after the *Humphries* and *Clay* opinions were called to the attention of the attorney prosecuting the appeal.

Counsel for Drake, Brent, and Union Carbide shall file with the clerk, not later than the fourteenth day following the date of this opinion, an affidavit in accordance with Local Rule 47.8, setting forth the time and expense (in the form of taxable costs) incurred in work reasonably done on this appeal on and after January 11, 1988.[6] We shall utilize this affidavit in determining the appropriate amount of attorneys' fees and costs to award.

The motion to dismiss the appeal is GRANTED. The motions for damages are GRANTED IN PART (to award double costs and partial attorneys' fees). The appeal is DISMISSED, but the mandate is STAYED pending determination of the amount of costs and attorneys' fees.

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[6] This date, thirteen days after appellees' counsel sent his letter of December 29, 1987, affords appellants' attorney ample time to have received, evaluated, and responded to that letter.

APPENDIX C

Lloyd ATWOOD, et al.,
Plaintiffs-Appellants,

v.

UNION CARBIDE CORPORATION, Drake Towing Company, Inc., and Brent Towing Company, Inc.,
Defendants-Appellees.

No. 87-4640

United States Court of Appeals,
Fifth Circuit.

Aug. 5, 1988.
Rehearing Denied Sept. 23, 1988.

Appellees moved to dismiss appeal from the United States District Court for the Southern District of Mississippi, John M. Roper, United States Magistrate. The Court of Appeals, 847 F.2d 278, dismissed appeal and awarded double costs and partial attorneys' fees. On petition for rehearing, the Court of Appeals held that: (1) special circumstances and apparently excessive billings claimed by one appellees' counsel warranted assessment of attorneys' fees that were more than nominal but considerbly less than fully conpensatory, and (2) conduct of appellants' attorney warranted order requiring attorney to pay attorneys' fees and nontaxable costs to appellees from his own resources.

Petition for rehearing denied in all other respects.

Russell S. Gill, Biloxi, Miss., for plaintiffs-appellants.

Robert M. Contois, Jr., New Orleans, La., James O. Dukes, Gulfport, Miss., for Union Carbide.

Lawrence E. Abbott, Michael G. Cordes, Gary P. Landry, New Orleans, La., for Drake & Brent.

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

Before GEE, RUBIN, and SMITH, Circuit Judges:

PER CURIAM:

Our opinion of June 21, 1988, dismissed the appeal and granted, in part, the motions for damages by awarding double costs and partial attorneys' fees. We directed appellees' counsel to furnish affidavits setting forth their costs and attorneys' fees. At about the same time that appellees' counsel were filing the requested affidavits, appellants' counsel presented his petition for panel rehearing on the motion for damages (but not questioning our dismissal of the appeal).

[1] Counsel for Union Carbide Corporation presents an affidavit for 14.9 hours of work on this appeal from January 11 through June 20, 1988, for a total of $1,341.00, or an average of $90.00 per hour. We find the hourly rate and number of hours to be reasonable. Non-taxable costs are asserted to be $1.019.13.

[2] Counsel for Drake Towing Company, Inc., and Brent Towing Company, Inc., has submitted an affidavit for 89.5 hours' work (also January 11 through June 20) for a total of $9,845.00, an average of $110.00 per hour. Non-taxable costs are $694.69.

We find Drake and Brent's hourly fee reasonable but its total number of hours—six times as many as Union Carbide's—appears excessive. Candidly, counsel has furnished us with his actual client billings. It is evident from those bills that the work done on the eight files (one for each appellant) overlapped a great deal and that the total hours worked were spread among the eight files more or less evenly, ranging from 10.3 hours for the lowest to 12.4 for the highest. So while the Union Carbide's attorney spent a total of 14.9 hours for the eight files (an average of 1.9 hours per file), Drake and Brent's counsel averaged 11.2 hours per file. While the work that needed to be done for the respective appellees may have differed somewhat, the disparity here—a ratio of about 6 to 1—is too great to overlook.

It is not clear whether the high number of hours worked for Drake and Brent is the result of inefficiency or multiple billings, but in either event, we cannot determine that billing 89.5 hours on this appeal for the five months in question was reasonable. Moreover, this is an appeal which appellees claim to be frivolous. In particular, they assert, and we have agreed, that on the basis of our opinion in *Humphries* and *Clay*, the appellants cannot prevail. It is difficult to understand how defending so frivolous an appeal could require anywhere near 89.5 hours' effort (which does not include an additional approximately 37 hours of work prior to January 11, 1988). Finally, we note that many of the issues covered in the instant appeal were briefed in the related *Bush* appeals, so the briefs in the present case should not have taken much additional time in preparation.

On petition for rehearing, appellants' counsel argues that he made efforts to communicate with his clients and to advise them to drop the appeal. The respective appellants either could not be reached or, in at least one

instance, refused to dismiss the appeal. Although we appreciate the dilemma an attorney faces when a client refuses to terminate a frivolous matter, appellants' counsel had other ethical options which he did not pursue. Nor did he respond to the briefing deadline of March 14, 1988, set by this court.

Because of the special circumstances which appellants' attorney has identified now for the first time on petition for rehearing, and in light of apparently excessive billings claimed by one appellees' counsel, we deem it appropriate to assess attorneys' fees that are more than nominal but considerably less than fully compensatory. And instead of double costs, we award single taxable costs and single non-taxable costs.

[3] Counsel for the appellants shall pay to Union Carbide, from his own resources, $500.00 attorneys' fees, plus $1,019.13 non-taxable costs. He shall pay to Drake and Brent jointly, $500.00 attorneys' fees, plus $694.69 non-taxable costs. Taxable costs normally charged by the clerk against the losing party shall be assesed in this case jointly and severally against the appellants and their attorney.

We reiterate that the adjustments made here are on the basis of the special circumstances of this case. There may be frivolous appeals in which no fees should be awarded, and others in which, as we have ordered in the past, appellants should pay fully compensatory attorneys' fees plus double costs. Counsel for the appellants in this case is admonished to abide more closely, in the future, by the rules and instructions applicable to the practice of law in this court.

The petition for rehearing is in all other respects DENIED.

APPENDIX D

PLAINTIFF	BEGAN EMPLOY	ENDED EMPLOY	# DAYS	FILED SUIT
Roy Carver	9/02/79	3/31/82	277 ½	7/19/84
Lloyd Atwood	4/03/79	4/17/79	14	7/19/84
Robert Pate	4/16/79	5/30/81	89 ½	7/19/84
Russell Carver	3/02/78	12/29/81	595 ½	7/19/84
Paul Hamm	2/10/79	4/14/79	50	8/9/84
Kevin Singleton	5/26/78	10/17/78	83 ½	8/23/84
Paul Pate	3/12/79	5/31/81	305 ½	8/23/84
Jeffery Welch	7/12/78	10/12/78	73	8/23/84

DELAY		SYMPTOMS
MAX	MIN	BEGAN
4 yrs/10 mos	2 yrs/3 mos	On plaintiff's first or second trip on M/V WARREN.
5 yrs/3 mos	5 yrs/3 mos	First *day* aboard M/V WARREN.
5 yrs/3 mos	3 yrs/1 mos	First trip aboard the WARREN in April, 1979.
6 yrs/4 mos	2 yrs/6 mos	During first year aboard M/V WARREN (*in* 1978).
5 yrs/5 mos	5 yrs/3 mos	During plaintiff's first hitch (i.e., 30 days) on the WARREN.
6 yrs/2 mos	5 yrs/10 mos	Between May and October, 1978.
5 yrs/5 mos	3 yrs/2 mos	In either March or April, 1979(second trip on WARREN).
6 yrs/1 mos	5 yrs/10 mos	Between the months of July-October, 1978.